

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA

Plaintiff-Appellee

-against-

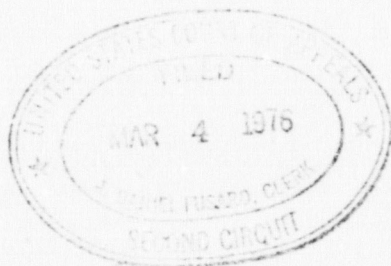
Docket No. 76-5511

FRAT C. TORRE

Defendant-Appellant

-----X

BRIEF ON BEHALF OF DEFENDANT-APPELLANT



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PRELIMINARY STATEMENT UNDER SECOND CIRCUIT
RULE 28

The decision herein was rendered after a plea of guilty before United States District Court Judge JOHN R. BARTELS in the United States District Court for the Eastern District of New York on October 23, 1975.

STATEMENT OF THE ISSUES

The issues in this case are:

1. Whether the District Court Judge abused his discretion by committing the defendant, rather than sentencing him under Title 21 United States Code Section 844(a).
2. Whether the sentencing of the defendant pursuant to Title 18 United States Code Section 5010(b) was violative of his right to due process and equal protection of the laws, because it exceeded the maximum sentence permissible under Title 21 United States Code Section 844(a).

STATEMENT OF THE CASE

The defendant-appellant pled guilty to an information on October 23, 1975 charging him with violating Title 21 United States Code Section 844(a), in that the defendant-appellant on or about the 20th day of May 1974, within the Eastern District of New York did knowingly and intentionally possess a quantity of cocaine, a Schedule II controlled substance, which possession was not pursuant to a valid prescription or order from a practitioner acting in the course of his professional practice and which possession was not authorized by any subchapter of the Narcotics Control Act of 1970.

The defendant-appellant was sentenced on December 19, 1975 before United States District Court Judge JOHN R. BARTELS. At the time of sentence the defendant-appellant stated he was a supervisor in a plastic recycling plant in Brooklyn and his attorney stated that the defendant-appellant had endeavored to cooperate with Federal Agents, that the defendant-appellant had one case for which he was on State Probation and two dismissals.

The United States District Court Judge JOHN R. BARTELS stated that dismissals are a matter of routine are expected and a mere matter of form.

On December 19, 1975 United States District Court Judge JOHN R. BARTELS sentenced the defendant to an indefinite term to the custody of the Attorney General for treatment and supervision pursuant to the provisions of the Youth Correction Act Title 18 United States Code Section 5010(b).

POINT I

THE SENTENCING OF THE DEFENDANT-APPELLANT TO AN INDETERMINATE TERM NOT TO EXCEED FOUR YEARS WAS ERRONEOUS ON THE GROUND THAT THE DISTRICT COURT JUDGE ABUSED HIS DISCRETION BY THE IMPOSITION OF THAT SENTENCE.

¹ "It is axiomatic that the broad discretion vested in trial judges in sentencing narrowly circumscribes the role of appellate courts in scrutinizing trial courts' final determinations. This historic deference, premised in great measure on the proximity of the trial judge to the criminal defendant, thus affording the court the opportunity of first hand observation and impressions which together with many other considerations must be weighed in passing sentence, continues unabated and remains uncompromised in any way by the result we reach today. For what we examine is not the severity or duration per se, of the sentences meted out by the district court, since it is undisputed that the sanction imposed in each case sub judice was within the statutorily-prescribed maximum. Appellate modification of a statutorily-authorized sentence, however, is an entirely different matter than the careful scrutiny of the judicial process by which the particular punishment was

(1) U.S. vs. Hartford 489FR2d 654

determined. Rather than an unjustified incursion into the province of the sentencing judge, this latter responsibility is, on the contrary, a necessary incident of what has always been appropriate appellate review of criminal cases. - - - - -

Accordingly we need not address the substantial body of precedent prohibiting the substitution of an appellate court's predilections for the broad discretion rightfully reposed in the trial judge inasmuch as we fully reaffirm that principle. We address instead the common issue raised by these appeals, namely whether the district judge abused his discretion by mechanically imposing the maximum allowable sentence rather than abiding by the judicially approved policy of individualizing sentences."

The defendant-appellant pleaded guilty to possession of a controlled substance in violation of Title 21 United States Code Section 844(a) and was sentenced under the Federal Youth Corrections Act Title 18 United States Code Section 5010(b) with a maximum term of four years confinement, instead of receiving the penalty imposed by the substantive Narcotics Statute which provides for a maximum penalty of one year imprisonment, a \$5,000 fine or both.

The defendant should have received no more than the maximum sentence provided by the substantive statute Title 21 United States Code Section 844(a) as opposed to the potentially longer time of the indeterminate term under Title 18 United States Code Section 5010(b).

The United States District Court Judge on learning that the defendant had a record was inclined to be punitive (5).

THE COURT: He has a record.

MR. VENOKUR: He has that one case, your Honor, where he is on the State Probation and has two dismissals.

THE COURT: I think in the Criminal Court of the City of New York dismissals are routine and expected. It's a mere matter of form there.

The United States District Court Judge went on to add: (6)

THE COURT: , indeed, I know what goes on in the Criminal Court of the City of New York, it's what they call the revolving door. And that door gets around pretty fast.

By sentencing under Title 18 United States Code Section 5010(b) it was the purpose of the United States District Court Judge to impose a greater sentence than that which could be imposed under the substantive statute Title 21 United States Code.

The District Court Judge had indicated his dissatisfaction as he stated of the "revolving door" of the Criminal Court of the City of New York and his sentencing of the defendant-appellant under the Federal Youth Correction Act served to circumvent the Congressional purpose by using the Act for punitive purposes.

In light of the foregoing the defendant-appellant's sentence should be vacated with instructions to resentence pursuant to the provisions of Title 21 United States Code Section 844(a).

POINT II

THE SENTENCING OF THE DEFENDANT-APPELLANT
PURSUANT TO TITLE 18 UNITED STATES CODE
WAS VIOLATIVE OF HIS RIGHT TO DUE PROCESS
AND EQUAL PROTECTION OF THE LAWS UNDER
THE UNITED STATES CONSTITUTION.

The defendant-appellant by pleading guilty to possession of a controlled substance in violation of Title 21 United States Code Section 844(a) faced a maximum penalty of one year imprisonment , a \$5,000 fine or both.

Had he been an adult the maximum term imprisonment would have been one year.

By virtue of the fact that he was sentenced under Title 18 United States Code Section 5010(b) and received an indeterminate term not to exceed four years, he was in fact being incarcerated for a lengthier time solely because he was a youth and such sentencing was arbitrary and violative of the defendant-appellant's right to due process.

The fact that the legislative purpose of the Youth Correction Act contemplates rehabilitation and not punishment is a matter of semantics and does not detract from the fact the defendant-appellant from a pragmatic standpoint faces a longer term of confinement solely on the basis of his age.

In light of the foregoing the defendant-appellant's sentence should be vacated with instructions to resentence pursuant to the provisions of Title 21 United States Code Section 844(a)..

CONCLUSION

THE SENTENCE OF THE DEFENDANT-APPELLANT
SHOULD BE VACATED

Respectfully submitted,

HEADLEY & ZEITLIN
Attorney for Defendant-Appellant